

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STEVE GERESY and the ESTATE OF MARILYN  
JOYCE BASTIAN,

UNPUBLISHED  
January 28, 2000

Plaintiffs-Appellants,

v

No. 212151  
Kalamazoo Circuit Court  
LC No. 97-000846 NM

CHARLES E. MARTELL, CHARLES E.  
MARTELL, P.C., ARTHUR W. PARKER,  
BEVERLY J. PARKER, AND LINDY SUE DEIKE,

Defendants-Appellees.

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Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants.<sup>1</sup> We affirm.

Plaintiff and decedent Marilyn Joyce Bastian (hereinafter "decedent") were involved in a relationship for an estimated twenty years. Decedent had a will prepared which designated plaintiff as the primary beneficiary. In 1992, plaintiff and decedent married. In 1995, decedent was treated for cancer, hospitalized and later transferred to a nursing home. During the treatment period of May 1995, decedent executed three wills. The first will was prepared by defendant Charles E. Martell. It was executed on May 19, 1995, and the beneficiaries consisted of Sherri Jean Deike as well as co-defendants, Lindy Sue Deike and Arthur W. Parker, Jr., family members of decedent. The second will was executed on May 21, 1995, and it was allegedly prepared by Frank Hanson, attorney for plaintiff. This will provided that plaintiff would inherit the bulk of decedent's estate should he survive her. The only other beneficiary, Sherri Deike, was to receive one-half of decedent's jewelry, all family photographs, and momentos. A third will, also prepared by defendant Martell and identical in all respects to the first will, was executed on May 23, 1995. The decedent passed away on January 10, 1996. Plaintiff filed a petition to disallow the admission of the will executed on May 23, 1995. On January 23, 1997, a settlement agreement in the probate proceeding was entered into between plaintiff and defendants Parkers and Deike. This settlement agreement provided that the May 21, 1995 will

would be admitted to probate, and that family member defendants, Arthur Parker, Beverly J. Parker and Lindy Deike, would receive \$10,000 and personal items, including clothing, jewelry, and photographs belonging to decedent.

On April 1, 1997, plaintiff filed a complaint on behalf of himself and in his capacity as personal representative of the estate of decedent. Plaintiff alleged: conflict of interest and breach of fiduciary duties owed by defendant Martell to decedent (count I), negligence/malpractice committed by defendant Martell against decedent and her estate (count II), fraud and conspiracy to defraud committed by all defendants against plaintiff and the estate (count III), claim and delivery against the estate by defendants Parkers (count IV), breach of fiduciary duty and constructive fraud by defendant Martell against both plaintiff and the estate (county V), and intentional infliction of emotional distress by all defendants against plaintiff Geresy (count VI). Defendants moved for summary disposition, and the trial court granted the motions.

Plaintiff first argues that the trial court erred in granting summary disposition of count one of the complaint. We disagree. A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997).<sup>2</sup> Plaintiff relies on *In re Peterson Estate*, 193 Mich App 257, 483 NW2d 624 (1992) in support of his argument that the trial court improperly dismissed the claim alleging conflict of interest and breach of fiduciary duty owed to decedent. However, the *Peterson* Court held that to establish claims of *undue influence*, it must be shown that the grantor was subjected to "threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *Id.* at 259. There is a presumption of undue influence where a fiduciary relationship exists from which the fiduciary benefits after the opportunity to influence the grantor's decision. *Id.* at 259-260. In the present case, plaintiff has not alleged a claim of undue influence. Furthermore, even if plaintiff sought to amend the complaint to allege a claim of undue influence, plaintiff has failed to present any evidence that defendant Martell exerted any influence over decedent. Accordingly, the trial court properly dismissed this claim.

Plaintiff next argues that the trial court erred in dismissing the "malpractice/negligence" action brought by decedent through her estate against defendant Martell. We disagree. Plaintiff alleges that defendant Martell failed to represent decedent when he drafted a will for the benefit of co-defendants. Plaintiff also asserted that a conflict of interest was presented and evidenced by co-defendants payment of legal services to defendant Martell. Defendant Martell testified that he met with co-defendants Parkers and Deike with the permission of decedent, but he did not disclose any information regarding the contents of decedent's will. Defendant Arthur Parker testified that the payment for legal services was made at the request and on behalf of decedent, and co-defendant family members would be reimbursed by the estate upon decedent's death. Therefore, defendants Parkers and Deike did not retain defendant Martell to represent their own interests. Plaintiff failed to allege and prove that any improper conduct or conflict arose from any fee arrangement between defendant Martell and co-defendants.

Additionally, while plaintiff alleged that defendant Martell breached his fiduciary obligations to decedent, the record reflects the contrary. Decedent retained defendant Martell to draft a letter to

plaintiff addressing his alleged dissipation of liquid assets. One week later, plaintiff filed a civil lawsuit against decedent who, in turn, retained defendant Martell to defend her in the action. Additionally, there were allegations that plaintiff had committed an assault and battery on decedent, who suffered a fracture as a result of the incident. Defendant Martell testified that he acted at the direction of decedent and provided a will in response to her desire that plaintiff not inherit her property upon her death. While plaintiff claimed that the decedent was “influenced” and that defendant Martell did not abide by her “wishes,” plaintiff failed to present evidence of conduct or conversations with decedent to contradict defendant Martell’s testimony.<sup>3</sup> MCR 2.116(G)(4). Furthermore, while plaintiff had obtained power of attorney from decedent, he acknowledged that the signature on the power of attorney “might have been her [decedent’s] signature with my [his] helping her sign it” because there was a time period during decedent’s illness where she lost use of her arms and legs. The documentary evidence presented indicated that defendant Martell was acting at the request of decedent, and plaintiff failed to present documentary evidence to create a factual issue. Accordingly, the trial court properly dismissed this claim.<sup>4</sup>

Plaintiff next argues that the trial court erred in dismissing the fraud and conspiracy to defraud claims brought by plaintiff on behalf of himself and the estate against all defendants. We disagree. A conspiracy is a concerted action by a combination of two or more persons who attempt to accomplish an unlawful purpose. *Goldsmith v Moskowitz*, 74 Mich App 506, 521; 254 NW2d 561 (1977). To establish a conspiracy to defraud, a plaintiff must show both an illegal purpose and damages. *Id.* Review of plaintiff’s deposition reveals that he had no evidence that defendants conspired to defraud him. Rather, plaintiff stated that he would have to speak with his neighbor about whether she was asked by defendants to watch his movements and actions. Plaintiff failed to provide any documentary evidence from any neighbor. Additionally, in deposition, plaintiff could not identify damages. Accordingly, the trial court properly dismissed this count.

Plaintiff next argues that the trial court erred in dismissing his allegations of claim and delivery against defendants Parkers. We disagree. Plaintiff entered into a settlement agreement with these defendants in the probate proceeding. Defendants argue, and plaintiff does not dispute, that affidavits were executed by the family member defendants at plaintiff’s insistence to demonstrate that they did not have any additional property in their possession. Plaintiff asserts that the settlement agreement entered during the probate proceeding addressed “certain property,” while the complaint in this action “is a claim for property that has been received by [defendants] Parkers outside of the Probate Court Settlement” which presents a question of material fact precluding summary disposition. A party opposing a motion for summary disposition may not rest upon the mere allegations of his pleadings, but must set forth with admissible documentary evidence specific facts to demonstrate that there is a genuine issue of material fact. MCR 2.116(G)(4). Opinions, conclusory denials, unsworn averments, and inadmissible hearsay do not satisfy a party’s burden. *SSC Associates Limited Partnership v Detroit General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991). A disputed fact must be established by admissible evidence. *Id.* In the present case, plaintiff concludes that defendants Parkers have additional property which is outside the settlement agreement, but he has failed to substantiate that assertion with documentary evidence and identify the missing property. Accordingly, the trial court properly dismissed this claim.

Lastly, plaintiff argues that the trial court erred in dismissing his claim of intentional infliction of emotional distress claim raised against all defendants. We disagree. The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996). In reviewing such a claim, it is initially for the court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995) Plaintiff failed to allege intentional conduct which would require submission of this issue to the jury, and the trial court properly dismissed this cause of action.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Janet T. Neff

<sup>1</sup> The case caption as prepared by plaintiff Steve Geresy does not reflect that he serves as dual plaintiffs. That is, plaintiff Geresy has filed this litigation in his own name for alleged wrongs committed against him and also serves as personal representative of the estate of Marilyn Joyce Bastian. Accordingly, for purposes of clarity, the term "plaintiff" will refer to Geresy, and the term "estate" will refer to the claims brought by Geresy on behalf of decedent Marilyn Joyce Bastian.

<sup>2</sup> Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). While plaintiff asserts that the basis of the trial court's decision to grant defendants' motions for summary disposition is unclear, it appears that the trial court held that plaintiff failed to present evidence to controvert the documentary evidence filed by defendants in support of summary disposition. Furthermore, because all parties submitted documentary evidence in addition to their pleadings, we will discuss the court's order under MCR 2.116(C)(10) only. *Hughes v PMG Building, Inc*, 227 Mich App 1, 4 n 2; 574 NW2d 691 (1997).

<sup>3</sup> Defendant Martell testified that he was contacted by Patricia Brogowitz, a social worker, after decedent expressed her concerns regarding her estate. Plaintiff did not present an affidavit or other documentary evidence from Brogowicz to refute this testimony.

<sup>4</sup> Plaintiff also argues that the trial court erred in dismissing the breach of fiduciary duty and constructive fraud claim brought on behalf of himself and decedent's estate against defendant Martell. Because this claim is merely a recitation of counts I and II of the complaint, we need not address it separately.